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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 719

COMMERCIAL COMMUNICATIONS, INC., et al.
and
WATSON COMMUNICATIONS SYSTEMS, INC., et al.,
Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
and
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

On Appeal from the Supreme Court of the State of California

MOTION OF APPELLEE THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY TO DISMISS APPEAL
and
BRIEF IN SUPPORT THEREOF

ARTHUR T. GEORGE,
140 New Montgomery Street,
San Francisco 5, California,
EUGENE M. PRINCE,
FRANCIS R. KIRKHAM,
Standard Oil Building,
San Francisco 4, California,
Attorneys for Appellee The Pacific Telephone and Telegraph Company.

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS APPEAL

The Pacific Telephone and Telegraph Company, one of the appellees herein, moves this Court, pursuant to Rule 16, subdivision 1, to dismiss the appeal herein on each and all of the following grounds:

1. The appeal is not within the jurisdiction of this Court because not taken in conformity to statute in that

it does not draw into question the validity of a state statute.

2. Appellants have no interest sufficient to sustain this appeal because neither the order of the Supreme Court of California nor the order of the California Public Utilities Commission affirmed by that court undertakes to regulate appellants or directs or prohibits any action by appellants.

3. The appeal does not present a substantial federal question.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

I.

OPINIONS BELOW

The opinion of the Supreme Court of California is reported in 50 Cal.2d 512, 327 P.2d 513, and is reprinted in the appendix to appellants' Jurisdictional Statement. Our page references to this opinion will be to appellants' appendix thus—(Cal.Sup.Ct. 1).

The opinion and order of the Public Utilities Commission of California, affirmed by the State Supreme Court, is reported in 55 Cal.P.U.C. 387, 17 PUR 3d 200, and is reprinted as an appendix to this brief. Our page references to this opinion will be to our appendix thus—(Cal. Comm. 1).

II.

STATUTES INVOLVED

The statutes involved are the portions of the Federal Communications Act next quoted, and the portions of the California Constitution and Public Utilities Code quoted in the opinion of the Court below (Cal.Sup.Ct. 5, 6).

Section 2 (b) of the Federal Communications Act (47 U.S.C. 152 (b)), with regard to the jurisdiction of the Federal Communications Commission, provides in part:

> "Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services,

facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or * * *."

Section 3(e) of the Communications Act (47 U.S.C. 153 (e)) provides in part:

"For the purposes of this chapter, unless the context otherwise requires—

* * * * *

(e) 'Interstate communication' or 'interstate transmission' * * * shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission."

III.

THE QUESTIONS PRESENTED

The question in this case is whether the intrastate service here rendered by appellee Telphone Company is a public utility telephone service, and, therefore, subject to regulation by State authority under the Constitution and statutes of California. All three alleged federal questions presented by appellants' Jurisdictional Statement (p. 4) are unsubstantial. This will be demonstrated in our argument.

IV.

STATEMENT OF THE CASE

Appellants' statement of the case contains inaccuracies and omissions so serious that correction requires a restatement.

The precise point in this case is the correctness of the ruling of the California Public Utilities Commission, affirmed by the State Supreme Court, in accepting a tariff filing (Schedule No. 108-T) by appellee Telephone Company. The tariff and the case itself relate to one aspect of intrastate mobile radiotelephone communication service furnished in California by appellee Telephone Company (sometimes referred to as "Pacific").

As the name indicates, mobile radiotelephone communication is between vehicles, moving or movable, and other vehicles or fixed points (Cal.Sup.Ct. 3-4). It involves the use of radio for which frequencies are allocated by the Federal Communications Commission under authority of the Federal Communications Act (47 U.S.C. 301, 303, 307, 309) and under Commission rules.

In one type of mobile service the telephone communications go through the general network of the Telephone Company (Cal.Sup.Ct. 4). Thus, a doctor wanting to telephone from his automobile to a patient or to the hospital calls the patient's or hospital's number through the Telephone Company. The doctor's office calls through the Telephone Company to reach the doctor's car. So it is in many other cases such as the traveling businessman keeping in touch with his office or customers. The radio frequencies used in this type of communication are allocated

to the Telephone Company by the Federal Communications Commission (F.C.C. Rules, 47 C.F.R., Part 21).

The above type of communication is for convenience called "public mobile." Ever since it became practicable the Telephone Company has rendered public mobile service as a public utility common carrier communication service under published tariffs (Cal.Sup.Ct. 4). The present case involves *no question* concerning public mobile service. There are, however, some practical public needs which such service does not meet (Cal.Sup.Ct. 4), and this fact points up the problem with which the present case *is* concerned.

A police car, needing immediate communication with a squad car or the police station, cannot afford time to call through the telephone exchange or to wait through busy signals. The same is true of the fire department, of forest fire patrols, locomotives, and power house operatives in remote places. A truck operator talking to another truck or a taxi driver talking to his dispatcher can more efficiently make his calls direct. There are many similar instances (see examples, Cal.Comm. 13).

To meet such needs, the Federal Communications Commission, on a proper showing, licenses individuals or businesses of certain types, to use certain frequencies for their "private" purposes (F.C.C. Rules, 47 C.F.R., Parts 7, 8, 9, 10, 11, 16 and 19). Telephone calls under these licenses do not go through a Telephone Company operator, but directly between the vehicles or stations of the licensee, quite comparably to the broker's use of his "private line" or "private wire." Connection with the general telephone system is, however, possible and permissible in case of emergency (Cal.Sup.Ct. 6).

To use the private frequency allotted him by the Federal Communications Commission, the licensee must, of course, obtain radiotelephone equipment and arrange for its upkeep and maintenance. The provision of such service, i.e., the furnishing of mobile radiotelephone equipment on a lease-maintenance basis, constitutes the so-called "private mobile service" covered by Pacific's tariff.

Pacific entered the private mobile field in 1948 by contracting with two customers to lease them equipment and maintain it (Cal.Comm. 6). In 1954 the California Public Utilities Commission required Pacific to file copies of all its private mobile contracts (Decision No. 50837, 53 Cal. P.U.C. 662, not reported in PUR). In 1955 the Commission required modification of contracts between Pacific and two of its customers, but held that it would not then require tariff filings because of insufficient experience with private mobile for the proper fixing of rates (*Southern California Gas Company* (1955) 54 Cal.P.U.C. 75, 80-81, 9 PUR 3d 193).

On March 30, 1956, Pacific filed the tariff schedule involved in the present case (Cal.Comm. 2). It thereby offered to serve without discrimination, and under tariff charges, all members of the public entitled to private mobile service, i.e., persons licensed by the Federal Communications Commission to use private mobile frequencies (Cal. Sup.Ct. 4, 5).

When Pacific filed this tariff its private mobile business represented 4½ per cent of California's total business (Cal.Sup.Ct. 5). Holding more than 95 per cent were 100 competitors of Pacific, large and small (Cal.Comm. 12).

A number of these competitors protested to the Commission against acceptance of Pacific's tariff (Cal.Comm. 3). When the Commission did accept it, only a few protestants sought to review the Commission's order in the California Supreme Court (Cal.Sup.Ct. 2), and only the present appellants have tried to come into this Court.

The protestants argued to the California Commission that acceptance of the tariff would tend to promote a monopoly by Pacific. Overruling this contention, the Commission found that the business is "highly competitive" (Cal.Comm. 12). It found, as said above, that Pacific had more than 100 competitors, and only 4½ per cent of the total business (Cal.Comm. 6, 12); further that Pacific's presence in the field constituted no "threat to the continued vigor of its competitors" (Cal.Comm. 20); also that regulation is not a competitive advantage but a competitive handicap, saying:

> "The Commission finds that competition of regulated companies with the nonregulated, if it is unfair at all, is more likely to be unfair to the regulated rather than to the nonregulated competitors" (Cal. Comm. 21).

The California Supreme Court affirmed the foregoing and similar findings of the Commission, saying in part (Cal.Sup.Ct. 9):

> "The commission found as a fact that there was no unfair competition by Pacific in this field, and ruled that it would not allow Pacific to give its private mobile customers service which it would not make available to the customers of its competitors and that it would require Pacific to maintain charges which would be fully compensatory."

None of the protestants below, including the present appellants, have ever dedicated their private mobile facilities to public use; all of them have maintained their absolute right to deal as they choose and with whom they choose (Cal.Comm. 24). Nevertheless, they contended that the Commission's regulation of the Telephone Company might subject them to regulation. The Commission overruled this contention (Cal.Comm. 24) and the Supreme Court of California affirmed, saying (Cal.Sup.Ct. 9):

> "No jurisdiction over the petitioners or other competitors of Pacific in this field has been asserted by the commission, and in its order it expressly disclaims any intention to assert such jurisdiction until there should be evidence that they had dedicated or were willing to dedicate their service to the public. Until the commission attempts regulation of these petitioners, they have no occasion to complain that they are denied due process of law by the commission's acceptance of Pacific's tariff. (*Stephenson v. Binford*, 287 U.S. 251, 277; *Continental Baking Co. v. Woodring*, 286 U.S. 352, 367-369; *Hicklin v. Coney*, 290 U.S. 169, 172-173.)"

Certain protestants contended below that the Commission's acceptance of Pacific's tariff involves violation of an antitrust consent decree rendered by the United States District Court for the District of New Jersey, January 24, 1956, in *United States v. Western Electric Company, Incorporated, et al.*[1] *(unreported)*.

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[1]Appellants make no showing (such as, we submit, is required by Rule 15(d)) as to when, how, or if ever, *they*—as distinguished from parties below who are not appellants here—raised any question below as to the consent decree. See *Sully v. American National Bank* (1900) 178 U.S. 289, 297-298.

As regards the present case the situation with respect to the consent decree is this: Appellants, who are not parties to the consent decree, assert that it unqualifiedly prohibits Pacific (as a subsidiary of American Telephone and Telegraph Company) from engaging "in the private radio business" (Jur.St. 10). Pacific contends, to the contrary, that the decree, Sections II and V of which are partially quoted below, permits Pacific to lease and maintain private mobile communication systems without restriction, where the charges therefor *are subject to public regulation*, i.e., rendered as a common carrier communication service; and that it also permits Pacific to continue rendering such mobile service to certain customers for a period of five years from the date of the decree (Jan. 24, 1956) even where the charges are *not* subject to such regulation.[2]

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[2]Section V of the decree partially reads:

"The defendant A T & T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries other than Western and Western's subsidiaries, in any business *other than the furnishing of common carrier communication services;* provided, however, that this Section V shall not apply to (a) furnishing services or facilities for the plaintiff [U.S. Government] or any agency thereof * * * (d) for a period of five (5) years from the date of this Final Judgment leasing and maintaining facilities for private communications systems, *the charges for which are not subject to public regulation*, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment * * *" (italics ours).

Section II of the decree, in stating definitions "For the purposes of this Final Judgment," provides in subdivision (i):

"'Common carrier communications services' shall mean communications services and facilities, other than message telegram service, the charges for which are subject to public regulation under the Communications Act of 1934, or any amendment thereof, or would be subject to such regulation thereunder if such a service or facility were furnished in interstate commerce; and shall also include any communications

This conflict of interpretation has never been presented to the district court which made the decree, though the decree contains the usual reservation of jurisdiction (section XVII, not mentioned in appellants' Jurisdictional Statement). Appellants invoke the interpretation of the Department of Justice (Jur.St. 8) as stated in proceedings before the Federal Communications Commission involving a tariff filing by American Telephone and Telegraph Company which is mentioned in the Jurisdictional Statement (p. 8). In this regard the California Supreme Court (Cal.Sup.Ct. 12-13) referred to the following statement contained in a memorandum opinion of the Federal Communications Commission released November 21, 1957 (23 F.C.C. 689, 692-693):

> "Justice, in its most recent pleading herein, has apparently taken the position that the Decree absolutely prohibits the respondents from leasing and maintaining equipment and facilities for private mobile communications systems as described in the tariff here at issue, whether or not this service is found to be a common carrier communication service. AT&T., the other party to the Decree, has taken an opposite view. Under such circumstances of disagreement between the parties to the Decree, it would appear that the most logical course to be followed in effectively resolving the conflict of interpretation is for one or both of the parties to apply to the court in which the Decree was rendered for such interpretation or clarification of the Decree as may be necessary. By the terms

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service or facility, other than message telegram service, *the charges for which are or become subject to regulation under existing or future laws of any state,* territory, or the District of Columbia, but only in the jurisdiction or jurisdictions in which the charges for such service or facility are subject to regulation" (italics ours).

of the Decree (Section XVII), that court appears to have retained continuing jurisdiction for this very purpose, among others. Obviously, this Commission has no standing to apply for such a determination. As we stated in our previous Memorandum Opinion of May 29, 1957, and as will be more fully developed hereinafter, we have been unable to find any basis in the specific language of the Decree to support the contention of PIEA and Justice as to the effect of the Decree. If, as has been contended, it is the *intent* of the Decree to absolutely prohibit the service, regulated or unregulated, then to the extent that such intent is not evident from the plain language on the face of the Decree, it would appear that only the court having original jurisdiction of the cause in which the Decree was entered may competently look beyond such language"[3] (italics by the Commission).

The California Supreme Court held that, in this state of affairs, the consent decree did not warrant the court in interfering with the decision of the California Public Utilities Commission (Cal.Sup.Ct. 13; see also Cal. Comm. 21-22).

The controversy over the meaning of the consent decree has, however, very recently led to a practical consequence outside the record of this case, but of which this Court should be informed.

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[3]Appellants incorrectly refer to this passage as "a now rescinded dictum by the Federal Communications Commission," citing *The Connecticut Water Co. et al.* (1958) 25 F.C.C. 1367, 1377 (Jur.St. 8). The service involved in the cited case, however, was not subject to public regulation; hence, appellants' reference to the case is not only pointless but misleading, as concerns the case at bar.

The Department of Justice has stated as its position that, notwithstanding the decision of the California Supreme Court upholding the decision of the California Commission accepting Pacific's tariff covering private mobile lease-maintenance service, Pacific cannot furnish such private mobile service to persons who were not lessees of private mobile systems on March 11, 1956, and in any event cannot furnish such service at all after January 24, 1961.[4]

Pacific believes, as here contended, that the Department misconstrues the consent decree. Pacific cannot, however, shut its eyes to the practical fact that the controversy over the meaning of the decree may not be finally determined by January, 1961. Neither can Pacific shut its eyes to the effect of this uncertainty upon its customers under the tariff. Fairness requires that they have ample time in which to make other arrangements if by January 24, 1961, Pacific should be compelled to stop serving them. In fairness to its customers, therefore, and on March 17, 1959, Pacific filed with the California Public Utilities Commission an application for authority to cancel its tariff Schedule No. 108-T, and to withdraw from the furnishing of private mobile communications service on a lease-maintenance basis by January 24, 1961, except as to service which may be provided to the United States Government. The Commission has not yet ruled on this application.

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[4]This position is set forth in Department letters to the Federal Communications Commission dated October 14, 1958, and February 20, 1959, the February letter appearing in F.C.C. Docket 12722.

V.

ARGUMENT

THE APPEAL SHOULD BE DISMISSED:

A. The appeal does not draw into question the validity of a state statute, but only the validity of a nonlegislative order of the State Public Utilities Commission.

Appellants' appeal is based on section 1257 (2) of Title 28 of the United States Code, so that the ground must be that the appeal draws into question the validity of a state statute. It is therefore significant that *no state statute* is cited in appellants' "Statutory Provisions Involved" (Jur. St. 3). Appellants say only that "The court below also considered several California statutory and constitutional provisions" (Jur.St. 3).

Nor does the appellants' argument attack the validity of any provision of the California Constitution or Public Utilities Code, whether cited by the court below or not. The only "state statute" drawn into question by appellants is the order of the California Commission affirmed by the State Supreme Court.

Decisions of a state commission which are "legislative" in character may be "statutes" within the meaning of 28 U.S.C. 1257 (2) for purposes of appeal, but an appeal is not supported by challenge of a *nonlegislative* commission decision (*Latshaw v. Missouri ex rel. K. C. Public Service Co.* (1930) 282 U.S. 806; *Catholic Order of Foresters, Inc. v. North Dakota* (1937) 301 U.S. 665).

Appellants do not question the fairness of the rates fixed by the Commission's order below or any other part of the order which could possibly be legislative in character. They attack the Commission's determination that it had jurisdiction under the California Constitution and

statutes (quoted Cal.Sup.Ct. 5-6) to regulate Pacific's private mobile service as a public utility telephone service. This was a judicial, not a legislative, determination.

The Commission, a body created by the California Constitution (Art. XII, sec. 22), exercises judicial as well as legislative functions (*Pacific Telephone etc. Co. v. Eshleman* (1913) 166 Cal. 640, 650, 137 Pac. 1119, 1121-1122; *Atchison etc. Ry. Co. v. Railroad Com.* (1931) 212 Cal. 370, 374, 298 Pac. 991, 992; *People v. Lang Transportation Co.* (1932) 217 Cal. 166, 170, 17 P.2d 721, 723).

In *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 632, 268 P.2d 723, 729, appeal dismissed (1954) 348 U.S. 859, the California Supreme Court held that the California Commission exercised *judicial* powers in determining that (1) defendant performed intrastate air common carriage; (2) defendant was a public utility subject to the jurisdiction of the Commission; and (3) the Federal Civil Aeronautics Act did not deprive the California Commission of power to regulate intrastate fares (42 Cal.2d 629-630, 268 P.2d 728).

In *Latshaw v. State of Missouri ex rel. Kansas City Public Service Co.* (1930) 282 U.S. 806, the appellant unsuccessfully urged, as the basis for jurisdiction, that the actions of the state commission—a rate-making body—in taking jurisdiction of the application of a street car company for a change of rates and in setting the matter for hearing were "statutes". The appeal was dismissed for want of jurisdiction.

At page 3 of the Jurisdictional Statement, appellants cite *Cities Service Gas Co. v. State Corporation Comm'n* (1958) 355 U.S. 391 and other cases as establishing juris-

diction of this Court "to review the judgment of the Supreme Court of California by appeal"—a broad statement, certainly. In so far as these cases cited by appellants involved review of administrative orders, they involved administrative action, legislative in character. They are irrelevant here where the challenged Commission action was judicial.

B. Appellants have no interest sufficient to sustain this appeal because they are not affected by the order appealed from. That order does not regulate them or direct or prohibit any action by them.

The order below regulates Pacific only. It does not regulate appellants or require them to do anything or not to do anything. The California Supreme Court said (Cal.Sup. Ct. 9):

> "No jurisdiction over the petitioners or other competitors of Pacific in this field has been asserted by the commission, and in its order it expressly disclaims any intention to assert such jurisdiction until there should be evidence that they had dedicated or were willing to dedicate their service to the public. Until the commission attempts regulation of these petitioners they have no occasion to complain that they are denied due process of law by the commission's acceptance of Pacific's tariff. (*Stephenson v. Binford*, 287 U.S. 251, 277; *Continental Baking Co. v. Woodring*, 286 U.S. 352, 367-369; *Hicklin v. Coney*, 290 U.S. 169, 172-173.)"

The above statement about due process is supported by the citations made to decisions of this Court.

It is also settled that an appellant cannot question the constitutionality of state legislation unless he is within the class affected by the unconstitutional feature, which

the present appellants are not (*Arkadelphia Co. v. St. Louis S.W. Ry. Co.* (1919) 249 U.S. 134, 149; *Heald v. District of Columbia* (1922) 259 U.S. 114, 123; *Southern Railway Co. v. King* (1910) 217 U.S. 524, 534; *Bode v. Barrett* (1953) 344 U.S. 583, 586).

Appellants argue that the California Commission order is unconstitutional because "discriminatory" as to the Telephone Company (Jur.St. 18). But appellants, who are not affected by the order, are not entitled to champion constitutional rights of others (*Aetna Insurance Co. v. Hyde* (1928) 275 U.S. 440, 446-447; *Dayton-Goose Creek Ry. v. U.S.* (1924) 263 U.S. 456, 484; *Sprout v. South Bend* (1928) 277 U.S. 163, 167).

C. The appeal does not present a substantial federal question.

Even if substantial federal questions could exist as to the validity of the order below, appellants, as just shown, would have no standing to raise them because the order does not apply to appellants.

Moreover, the three questions raised by appellants are all unsubstantial. The following facts are important, preliminarily in that regard: (1) This case involves *intrastate* service (Cal.Sup.Ct. 11); and (2) the California Supreme Court and the California Commission in upholding the State's right to regulate made very pertinent findings; i.e., that the field here involved is highly competitive (Cal. Comm. 12); that Pacific has less than 4½ per cent of the business therein (Cal.Comm. 6); that regulation of Pacific would not be a help but a handicap as against competitors (like appellants) free of regulation (Cal.Comm. 21); that Pacific's participation as a public utility in this field offers no threat to competitors (Cal.Comm. 20); that Pacific un-

der the Commission order cannot withhold from customers of competitors in this field any service available to its own customers (Cal.Sup.Ct. 9); that there has been no unfair competition by Pacific (Cal.Sup.Ct. 9); that regulation in this case involves no tendency toward monopoly, and that regulated and nonregulated services compete in many fields (Cal.Sup.Ct. 7, 9).

These findings, of course, are entitled to the respectful consideration of this Court and are to be accepted unless demonstrated to be erroneous on the record (*Pick Mfg. Co. v. General Motors Co.* (1936) 299 U.S. 3, 4). Appellants' whole argument, however (Jur.St. 10-20), is predicated on disregard of these findings or unsupported statements which contradict them.

1. There is no substantial federal question under the Fourteenth Amendment.

Appellants' point is that the opinion below does not "reflect a rational reason why the private radio business in California should be deemed a 'public utility'" (Jur. St. 16). This presumably is intended to say that the Fourteenth Amendment prohibits the states from regulating the type of intrastate radiotelephone communication service involved in the present case.

This point, we submit, was correctly disposed of below. In answer to arguments based on the Fourteenth Amendment, the California Supreme Court pointed out many respects "in which the private mobile communication systems are of public concern" including their use "by public transportation companies, trucking companies, law enforcement agencies, fire departments, and utility companies such as irrigation and water companies" (Cal.Sup.

Ct. 9). The court held that these and other matters of public concern, to which it referred, afford a reasonable basis for public regulation where the property involved has been dedicated to public use, and that the Fourteenth Amendment does not prohibit such regulation (Cal.Sup. Ct. 8, 9-10). We submit that this ruling was manifestly correct *(Nebbia v. New York* (1934) 291 U.S. 502, 531-532; *Cities Service Co. v. Peerless Co.* (1950) 340 U.S. 179, 186).

2. There is no substantial federal question under the Federal Communications Act.

Appellants' point here is that the order below "conflicts with the paramount federal policy of the Communications Act for the competitive development of radio" (Jur.St. 12).

In reply we refer again to findings below, based on ample evidence, that there has been no unfair competition by Pacific and that regulation of Pacific will promote, not decrease, competition (supra, 8-9, 17-18).

We also point out again that this case involves *intrastate* communication service regulated by a state commission. The policy of the Federal Communications Act which is material to the case at bar is stated in section 2(b) of the statute itself (previously quoted under Statutes Involved). That section provides that nothing in the statute shall give the Federal Communications Commission jurisdiction over charges, etc., "for or in connection with *intrastate communication service by wire or radio of any carrier*" (italics ours).[5]

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[5]It may be added that section 3(e) of the Communications Act (also quoted under Statutes Involved) recognizes the significance of regulation by a state commission by providing that "Interstate

At page 13 appellants say that the Federal Communications Act

> "• • • incorporates and applies to radio communications as well as 'apparatus and devices' the antitrust laws' prohibitions on trade restraints and monopolization, and expressly directs the Federal Communications Commission to enforce against common carriers the Clayton Act's ban on exclusive and tying arrangements."

The above statement is pointless as applied to the present appeal. No contention about tying arrangements was made below: further this case obviously involves no tying arrangements, and further still, under express findings below, there never has been any unfair competition by the Telephone Company and the order below involves no tendency toward monopoly. In its sweeping generality appellants' statement is, moreover, inconsistent with the recent decision in *United States v. Radio Corporation of America* (Oct. Term, 1958, No. 54, Feb. 24, 1959) 27 U.S. Law Week 4179, 4182, where this Court said:

> "Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts."

3. The case does not present a substantial federal question under the consent decree.

We have stated the alleged conflict between the consent decree and the order below (supra 9-12)—appellants as-

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communications • • • shall not • • • include wire or radio communication between points in the same State", even though the message goes through places outside the State "if such communication is regulated by a State commission."

serting that the decree prohibits Pacific from engaging in the service covered by its tariff, whereas Pacific contends that there is no such prohibition because the charges for the service are subject to public regulation (supra 10).

Appellants are not parties to the consent decree. They invoked it presumably in order to eliminate Pacific as a competitor—this notwithstanding that the burden of their argument on almost every page is the maintenance of unrestricted competition. The "internal inconsistencies" of such a position were noted by the Commission below—"On the grounds of preserving competition they seek to bar a competitor from the field" (Cal.Comm. 20).

The important point here, however, is that the dispute as to the meaning of the consent decree has never been submitted to the district court which made the decree, notwithstanding the provision therein for reserved jurisdiction (sec. XVII), a provision to which appellants do not refer. We submit, therefore, that the interpretation of the consent decree is not a proper subject for argument here. There is no basis, we submit—and certainly appellants have cited no authority—for asking this Court, as a matter of first impression, to interpret a decree of a federal district court on a question never presented to the district court, but over which it still retains jurisdiction (see *U.S. Gypsum Co. v. Nat. Gypsum Co.* (1957) 352 U.S. 457, 464).

We will say that, in our view, there is no specific language in the decree which states what appellants say the decree means—and this apparently was the view also of the California Supreme Court (Cal.Sup.Ct. 11-13), the California Commission (Cal.Comm. 21-22) and the Federal Communications Commission (quotation, supra 11-12).

But, in any event, and as noted below (Cal.Sup.Ct. 12-13), there has been no authoritative federal determination of the question of interpretation. In such a situation, we submit, the consent decree affords no basis for overruling the decision below.

D. There is no merit in arguments made by appellants.

Appellants' arguments are, we submit, answered by things already said but we offer the following further comments.

Appellants state that the first of "the questions presented" is (Jur.St. 4):

> "(1) Whether a state agency can exempt a corporation from the prohibitions of a judicial decree of the United States enforcing the federal antitrust laws."

There is no such question. Neither the California Commission nor the Supreme Court of California undertook to exempt anybody from the antitrust laws, and most certainly would not make any absurd claim of jurisdiction to do so. Appellants' statement of such a question is, we submit, completely irresponsible and of the same character as certain other statements in appellants' argument; for example, that which characterizes the decision below as "letters of marque, in the guise of public utility status, permitting a monopoly to prey on its independent competitors" (Jur.St. 19).

Appellants assert that Pacific brought about "voluntary or procured" regulation (Jur.St. 15). The statement is immaterial, the issue being the legality of the order below. The fact is, however, contrary to appellants' assertion, Pacific resisted the Commission's assumptions of juris-

diction in 1954 and 1955 (supra 7-8), and while complying with the Commission's orders, did so under protest (Cal.Comm. 14-15, 22). The 1956 tariff here involved was filed after these earlier assertions of jurisdiction by the Commission, and the Commission said in the present case that its decision taking jurisdiction involved adherence to "our earlier view" (Cal.Comm. 14).

Throughout their argument appellants disregard the findings. Thus arguments about monopoly appear on almost every page, but there is nowhere any reference to the contrary findings on this subject (supra 8-9, 17-18), much less any record references or quotations to show that such findings were unsupported.

VI.

CONCLUSION

We respectfully submit that the appeal should be dismissed. Treating the papers on appeal as a petition for certiorari, we submit that certiorari should be denied.

Dated: March 24, 1959.

ARTHUR T. GEORGE,
EUGENE M. PRINCE,
FRANCIS R. KIRKHAM,
Attorneys for Appellee The Pacific Telephone and Telegraph Company.

(Appendix Follows.)

Appendix.

Appendix

Before the Public Utilities Commission of the State of California

Decision No. 54438

Investigation and suspension on the Commission's own motion of Schedule No. 108-T of The Pacific Telephone and Telegraph Company filed by Advice Letter No. 6371.	Case No. 5754

[Appearances and List of Witnesses are set forth in Appendix A which is omitted in this printing]

INTERIM OPINION

Nature of Proceeding

This is an investigation inaugurated April 24, 1956, on the Commission's own motion, into the proposed rates and conditions applicable to private mobile communication systems furnished on a lease and maintenance basis by The Pacific Telephone and Telegraph Company, hereinafter referred to as Pacific.

Heretofore, Pacific has made a tariff offering of public mobile radio telephone service whereby a subscriber could place a telephone call through a control office to a person in a motor vehicle, and vice versa. It represents that it is a popular and useful service. Thereafter, Pacific

had inquiries about the possibility of providing such facilities on a private basis, that is, where subscribers would not have to call through a central office or wait for other calls, but could keep in touch with motor vehicles at any time.

In response to these inquiries, beginning in 1948, Pacific started on an experimental basis to enter into contracts under which it would furnish and maintain all of the equipment and facilities for the subscriber's use and operation under license from the Federal Communications Commission, hereinafter referred to as F.C.C. Pacific represents that the trials were successful and that the number of contracts grew. Copies of these contracts are filed with the Commission pursuant to Decision No. 50837 under Application No. 33935, Case No. 5570, dated December 7, 1954. Pacific now considers that it has sufficient experience as to the equipment, costs of installation and maintenance to warrant the filing of tariffs containing a definitive statement of the terms, conditions and charges upon which the service would be available generally. It contends that, with the number of inquiries now being received from the public, such a tariff is necessary and appropriate in the interests of speedy and efficient service.

Accordingly, on March 30, 1956, Pacific filed the tariff involved here, Schedule No. 108-T, to become effective on April 30, 1956. On April 10, 1956, the Commission by Resolution No. T-3270 granted authority to make said tariff schedule effective on April 30, 1956.

Before the tariff became effective, the City of Los Angeles and a group of concerns and persons engaged in

the installation and maintenance of private mobile radio systems filed petitions for rehearing, contending among other things, that the services proposed to be rendered under the tariffs are not public utility in character and that the filing is an attempt to circumvent the Consent Decree[1] under which Pacific, as a subsidiary of American Telephone and Telegraph Company, was enjoined from engaging in any business other than the furnishing of common carrier communication service. These petitions indicated the need for investigation by the Commission and, accordingly, the operation of Schedule No. 108-T was suspended and public hearing was scheduled.

Public Hearing.

After due notice, a public hearing was held before Commissioner Ray E. Untereiner and Examiners Wilson E. Cline and Manley W. Edwards on the following days and at the following places: July 30, October 17, 18, 19, and 31, and November 1 and 2, 1956, in San Francisco, and October 24 and 25, 1956, in Los Angeles. The testimony was concluded on November 2, 1956, and the parties were granted permission to file concurrent briefs not later than December 21, 1956. Briefs have been filed and the matter is ready for decision. During the course of hearing requests were made for a proposed report by the presiding officers and objection thereto was filed by Pacific. In our opinion, all parties have stated in their briefs substantially everything that they would raise in the way of exceptions to the proposed report. Such requests are hereby denied.

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[1] *United States of America v. Western Electric Company, Inc.* and *American Telephone and Telegraph Co.*, Civil Action No. 17-49 in the United States District Court for the District of New Jersey, January 24, 1956.

On January 16, 1957, counsel for Pacific filed a motion to strike the parts of the brief filed by Joseph E. Keller on behalf of himself and the Petroleum Industry Electrical Association beginning with the last paragraph on page 2 to and including page 12, line 1. Said motion is hereby granted on the grounds that these portions of the brief pertain to matters which are not of record and which are irrelevant and immaterial to any issue in the proceeding.

Nature of Testimony

At the outset of the hearing Pacific listed the issues as: (1) Is a tariff filing appropriate at this stage of development of this service, and (2) Are the charges, terms and conditions set forth in the tariff reasonable and proper and not discriminatory or preferential. It then proceeded to present three witnesses to explain: (1) the tariff and the development of the service, (2) the basis of the charges, and (3) that the continuation of this service will not burden or adversely affect the remainder of its public utility undertaking.

The protestants and interested parties viewed the matter as of much more importance and far reaching effect than Pacific did and proceeded to question the utility status of this service, to question the offering of this service by a large telephone company as providing unfair competition to small private business concerns and to question whether this is a proper activity for a telephone utility to engage in.

The Proposed Tariff

Schedule 108-T provides rates, charges and conditions for private mobile radio telephone systems furnished on

a lease and maintenance basis by Pacific. It offers the most generally used equipment items at stated rates when such items are provided under normal conditions. It also contains provisions for furnishing equipment at charges based on estimated cost for special equipment and arrangements not specifically covered in the schedule. It provides that the station licensee will be responsible for securing from the F.C.C. the necessary authorizations for the communication system and such operative personnel as may be required by the rules of the F.C.C. Such service will be furnished to persons or organizations other than communication common carriers, licensed by the F.C.C. in the Maritime, Aviation (not including aircraft stations), Public Safety, Industrial, Land Transportation or Citizens Radio Services. It also provides that the station licensee shall have exclusive control of the communication facilities and shall have full responsibility for their use and operation in accordance with F.C.C. rules. In addition to limitations as to liability, provisions as to minimum charges, basic termination charges, location of land stations and mobile stations are provided.

As examples of the proposed tariff rates, for a low power land station the monthly rate is $28; for a high power land station the monthly rate is $74; and for a mobile station the monthly rate is $20. In addition, rates for such items as antennas, poles, control consoles, push-to-talk hand telephones, control relays and other items are provided. The land station equipment is subject to a basic termination charge which reduces at the rate of 1/60 each month. The mobile station equipment and supplemental equipment are subject to installation charges.

Pacific's first witness testified that the charges set forth in Schedule No. 108-T are generally the same as those now being charged in the present contracts, except for a few minor increases and decreases. Likewise, he testified that the conditions set forth in the proposed schedule are essentially the same as those now included in contracts for furnishing private mobile telephone service. A copy of the proposed Schedule No. 108-T is included in the record as Exhibits Nos. 1 and 1-B and illustrative forms of contracts as Exhibits Nos. 2 and 2-A.

Service Development

As has been previously mentioned the number of contracts by Pacific for private mobile communication systems has grown since the start in 1948. As of April 30, 1956, the number had grown to 214 in the State of California. Exhibit No. 3 shows the following growth trend:

	Number of Contracts	
Year	Made During Year	Cumulative Total
1948	2	2
1949	0	2
1950	1	3
1951	0	3
1952	0	3
1953	5	8
1954	64	72
1955	115	187
1956	27	214

Applicant's first witness testified that these 214 contracts represent less than 4.5 percent of the total private mobile base stations licensed in the State of California. As of April 30, 1956, these contracts covered 1,702 private mobile units and currently many new parties are seeking

these private systems. This witness indicated that 225 inquiries are on hand for these private systems.

In view of the apparent large unsatisfied demand for this private service, inquiry was made of the witness as to the reason why this service could not be handled by the regular public mobile telephone service being offered by Pacific. The reply was that as nearly as he could determine none of those making inquiries can be served satisfactorily by public mobile service because such parties generally have a requirement for calling within their own organizations or between their own units. For such purposes, public mobile service is not satisfactory. The public mobile telephone is subject to the delay of waiting for a channel, if the channels are busy, and to the delay arising from the necessity of placing the call through an operator.

This witness also testified that as of September 30, 1956, there were 1,412 mobile stations in the public mobile system and as of that date Pacific was holding orders for an additional 3,397 mobile units.

Quality of the Service

A number of parties which were receiving private mobile radio-telephone under contracts with Pacific, upon learning of the fact that the Commission was investigating this service, took the trouble to make appointments, appear, and present testimony at the hearing regarding the quality of the service. An even larger number wrote letters about the service to the Commission. Almost universally they asserted that the service rendered by Pacific was very satisfactory, that maintenance service was available generally on a 24-hour basis and that the rates

charged were reasonable. All desired that the service be available and continue in the future.

Principal Issues

After analyzing the extensive record in this proceeding, the principal issues in the Commission's opinion are:

1. Is the offering by Pacific to furnish mobile communication equipment on a lease and maintenance basis without discrimination to persons authorized to operate private mobile communication systems an offering of public utility service by a telephone corporation under the provisions of the California Constitution and the Public Utilities Code?

2. Does Section 851 of the Public Utilities Code require Pacific to obtain the authorization of this Commission to lease mobile communication equipment to persons authorized to operate private mobile communication systems?

3. Does the Federal law preclude this Commission from regulating the rates charged by a telephone corporation for leasing and maintaining mobile communication equipment to persons authorized to operate private mobile communication systems?

4. Would the authorization of tariff rates for private mobile communication service provide unfair competition to small businessmen offering similar services on a contract basis, contrary to the intent and purposes of the Consent Decree?

5. Should the Commission assume jurisdiction over the private operators in this business?

6. Will the continuation of this service be deleterious to the regular communication service furnished by Pacific?

7. Are the proposed rates at a reasonable level for the type and quality of service being rendered?

Issue 1—Public Utility Service by a Telephone Corporation

Pacific represents that its corporate purposes and powers as set out in its articles of incorporation are sufficiently broad to include the furnishing of private mobile communication systems on a lease and maintenance basis. It also represents that it is not limited to "land lines" in conducting its telephone business. Pacific states that while it does in fact own and operate many miles of land or wire lines, it has performed telephone service by radio in California for many years and much of its present communication network in California consists of radio equipment and channels used for point-to-point as well as mobile communications that radio has been used in its telephone business since 1921 and at the present time it operates about 350,000 toll circuit miles of microwave in California; that ordinary toll service goes as much by radio as by land lines; and that radio is also used for such diverse services as rural subscriber lines, coastal harbor service and highway service.

Pacific states that as a corporation owning and furnishing "telephone lines", i.e., private mobile communication systems, it operates as a telephone corporation as defined in Section 324 of the Public Utilities Code.[2] Section

[2]Section 234 of the Public Utilities Code provides:
"'Telephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this State."

233 of the Code defines "telephone line" as including "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires."

Pacific also states that all telephone corporations are not necessarily public utilities, but a telephone corporation which offers service to the public is declared to be a public utility by Section 23 of Article XII of the California Constitution[3] and by Section 216 of the Public Utilities Code.[4]

In furnishing private mobile communication systems on a lease and maintenance basis, Pacific states that it qualifies as a public utility both on the ground that it is furnishing a service and on the ground that such service is offered to the public.

Protestants held a different view and one witness insisted that the leasing and maintaining of inert radio equipment for F.C.C. private mobile station licensees is

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[3]Section 23 of Article XII of the California Constitution provides in part as follows:

"Every private corporation and every individual or association of individuals, owning, operating, managing or controlling any • • • plant, or equipment within this State • • • for the transmission of telephone or telegraph messages • • • either directly or indirectly, to or for the public • • • is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature, • • •."

[4]Section 216(a) of the Public Utilities Code provides in part:

"'Public utility' includes every • • • telephone corporation • • • where the service is performed for or the commodity delivered to the public or any portion thereof."

neither a telephone service in fact nor within the intendment of the Public Utilities Code. He cited a recent decision of the California Supreme Court in the Television Transmission Case[5] wherein the issue was whether the coaxial antenna service constituted a telephone service, i.e., the operation of a "telephone line" as defined in Section 233 of the Code. He stated the Court concluded that a company does not operate a telephone line and is therefore not a telephone corporation unless such control, operation and management are in connection with or to facilitate communication by telephone, and further that the service petitioner rendered was not communication "by telephone" within the meaning of the Code.

Pacific also cited this case and stated the Court drew a distinction between television broadcasting and telephony quoting: "* * * in telephony one may carry on a two way conversation by speaking as well as listening * * *." Pacific represents that private mobile systems are telephone systems, since they consist of transmitters and receivers for carrying on two-way voice communication between land stations (sometimes called base stations) and mobile stations.

Another party stated these activities are not telephone service, but are equipment service, and the mere leasing, installation or maintenance of radio equipment for private mobile radio or any combination of these activities, without the ability to furnish the channel upon which such equipment is used, bear no indicia of the monopoly char-

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[5]*Television Transmission, Inc. v. Public Utilities Commission*, 301 P. 2d 862 (Cal. Sup. Ct., 1956).

acteristics of telephone service.[6] Quite the contrary, he states, the leasing installation and maintenance of equipment for private mobile radio is in fact a highly competitive industry in which over 100 persons are directly engaged in the State of California alone.

Pacific advanced a different view, stating there is nothing unusual in the fact that regulated public utilities and unregulated enterprises may be furnishing the same or a similar type of service in the same locality at the same time. In the absence of an exclusive franchise a public utility has no right to be free from competition; and by the same token it is fundamental to our competitive system that unregulated businesses have no right to freedom from competition, so states Pacific, and it cites two cases[7] outside of California. Competition between municipal utilities not subject to the jurisdiction of this Commission and public utilities in this State are not uncommon. Pacific indicates that dedication of its property to public service subjects it to Commission regulation and states that by submitting to regulation of the Commission it has voluntarily dedicated its private mobile facilities and business to a public use, citing several cases.[8] In this connection it should be pointed out that the selection of the persons who

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[6]This party stated: Perhaps the outstanding indicia of telephone service is the necessity that it be a monopoly in a given geographical area and cited: *California Fire Proof Storage Company v. Brundige*, 199 Cal. 185, 189).

[7]*Tennessee Power Co. v. T.V.A.* (1939) 306 U.S. 118; *Alabama Power Company v. Ickes* (1938) 302 U.S. 464.

[8]*Palerino L. & W. Co. v. Railroad Commission* (1916) 173 Cal. 380, 384; *Franscioni v. Solidad Land and Water Co.* (1915) 170 Cal. 221, 227; *Stunson Lumber Co. v. Kuykendall* (1927) 275 U.S. 207, 212.

fall within the portion of the public to which the service is offered will be made by the F.C.C. and not Pacific.

Pacific represents that it requires no certificate of public convenience and necessity to furnish telephone service, including the leasing and maintaining of private mobile telephone systems, because it acquired the right to engage in that business under its charter granted by the State of California prior to 1912 when certificates, as now required under Sections 1001 and 1002 of the Public Utilities Code, were first required.

If Pacific were not permitted to continue in this business it cited several examples of the adverse effect it would have on the public. Pacific points out that without exception the other suppliers who appeared in this proceeding testified that they reserved the right to refuse service at their option. Pacific is ready to serve the public without discrimination and states that the testimony showed 225 pending inquiries about the service since the matter of tariff filing has been in abeyance—inquiries from government agencies, law enforcement agencies, utility companies, hospitals, service companies, newspapers, labor unions, farmers, food and feed businesses, oil companies, mining companies, taxicab companies, express companies, builders, contractors, lumber companies, banks, warehouses, and a large number of others.

Other types of service considered as "telephone service" and served under filed tariffs which Pacific considered analogous to the private mobile radio service are:

1. "Private leased line" service
2. Local private lines

3. Telemetering service
4. Code calling equipment
5. Loud speaker paging equipment
6. Buzzer equipment

As one answer to the charge that this private mobile telephone service is not appropriate for Pacific as a public utility, it referred to Decision No. 51271 issued by this Commission on March 29, 1955, concerning the sale by the Southern Counties and Southern California Gas Companies of their radio telephone system to Pacific and contracts to lease-back the equipment and have Pacific furnish the maintenance.

In Decision No. 51271 Pacific was not authorized to enter into the arrangement at the rates and prices as proposed, but later was so authorized by Decision No. 51446, however, at a higher annual payment in order not to result in any burden on the regular telephone subscribers of Pacific. Our conclusion at that time was that the proposed service will become a public utility service but that there was insufficient experience to warrant the filing of tariffs. We then pointed out that Pacific's entry into this field was still on an experimental basis, and that it might be a disservice to its telephone ratepayers to require it to file tariffs and offer this service to all comers. However, our conclusions at that time were on a considerably less extensive record than is now before us.

After studying the extensive record we find no reason to change our earlier view. Pacific is definitely a public utility under the California Constitution and the Public Utilities Code; it is not only willing now to dedicate its

mobile communication property to the public service in private automobiles for private as well as public mobile communication service and to file tariffs as required by the Public Utilities Code, but we hereby find that it has in fact so dedicated its property and service.

The Commission finds that Pacific's offering in its proposed Schedule 108-T to furnish mobile communication equipment on a lease and maintenance basis without discrimination to persons authorized to operate private mobile communications systems is an offering of public utility service by a telephone corporation under the provisions of the California Constitution and the Public Utilities Code.

Issue 2—Lease of Necessary or Useful Utility Property

One of Pacific's witnesses testified that the same types of equipment are used in the private mobile radio telephone systems as are used in its regular public mobile radio telephone service offering. Section 851 of the Public Utilities Code provides that "no utility shall sell, lease * * * or encumber the whole or any part of its * * * plant, system or other property necessary or useful in the performance of its duties to the public * * * without first having secured from the Commission an order authorizing it so to do."

Inasmuch as leasing is contemplated of necessary and useful utility property, Pacific is required under the Code first to obtain an authorization of the Commission so to do. In the past Pacific has filed copies of the various private mobile communication contracts with the Commission and has secured Commission authorization, by reso-

lution, before contracts relating to the furnishing of private mobile communication service have become effective. Only in the Southern California and Southern Counties Gas Companies' sale and lease back arrangement did Pacific seek and first obtain an order of the Commission. In looking to the future and the large number of customers that may be involved, it would indeed be cumbersome for the utility to have to obtain a specific authorization of the Commission preliminary to each leasing of mobile communication equipment. The authorization which will be granted to Pacific to file Schedule 108-T as hereinafter modified will constitute the necessary authorization by the Commission for Pacific to lease the mobile communication system equipment.

Our conclusion on this point is that the proposed private mobile communication systems will be composed of necessary or useful utility equipment and the leasing thereof is subject to Commission jurisdiction.

Issue 3—State Regulation of Intrastate Mobile Communications

Some of the protestants pointed out that radio transmissions are not respective of geographical boundaries and some of the signals will undoubtedly traverse state lines. This condition could exist. The Federal Communications Commission has regulatory authority in respect to rates and charges for interstate communications and international communications. However, the provisions of Sections 2(b) and 3(c) of the Communications Act of 1934 as amended (47 U.S.C. 152 and 153), make it clear that the Federal Communications Commission has no jurisdiction, except under the radio licensing provisions of

the Act, over intrastate communication service by radio and that "interstate communication by radio" does not include communication between points in the same state, if such communication is regulated by a State Commission.

The private mobile telephone communication with which we are here concerned involves communication between points within California. We have concluded that the rates to be charged by Pacific for its services in connection with such communication are subject to regulation by this Commission. The federal law clearly does not preclude such regulation.

Certain parties suggested that private mobile licensees obtaining their equipment from Pacific on a lease and maintenance basis do not have control of the equipment as required under the F.C.C. rules. While most of the parties leasing equipment from Pacific preferred that the technical adjustment and maintenance be performed by Pacific's technicians, it appeared that technically these parties had control of the equipment. Even if they did not, that is a matter for the F.C.C. to deal with and is not an issue within our province.

Issue 4—Unfair Competition and the Consent Decree

A Congressman from California, appearing as the representative of Subcommittee 5 of the Small Business Committee of the House of Representatives, stated: "It appears that the filing of tariffs definitely reflects unfair competition to the many small businessmen of our state." He was familiar with the Consent Decree (Supra Note 1) and continued: "Under the Decree, the American Telephone and Telegraph Company, Western Electric and

their subsidiaries are forbidden to engage in any business other than the furnishing of common carrier services, yet that term is defined in such manner that the small businessman in the private communication service will be afforded little actual protection." He charged that the strategy is for the telephone companies, whose private communication services were not then subject to regulation, to file tariffs with the various state commissions in order to bring them within regulation and so exempt those operations from the prohibitions of the Decree.

He also indicated that not only does the Consent Decree fail to accomplish what the government endeavored to do seven years ago, but it actually assists big business to the detriment of the independent and small businesses. He contended that by that decree the monopoly position of the applicant may be even further extended into the area of private communications. He gave his considered opinion that the free enterprise system of our country and the over-all benefit of all California citizens will best be protected by denying the present tariff filing of the applicant.

Counsel for Pacific responded and stated that there is no substance to this charge of unfair competition because the telephone utility must offer the service at a fixed rate while all other concerns, including the small businesses in which the Congressman is interested, are free to undertake the utility if they see fit, and if the customer wishes to take the lower bid he is free to do so. He also stated that the monopoly protection afforded public utilities is not competitive protection with regard to the furnishing and

maintaining of private mobile communication service and works as a restriction rather than a preference.

Much of the time of the protestants at the hearings was devoted to the voicing of fears and conjectures as to the possible consequences of our accepting these tariffs. The fears were apparently real, and the Commission wanted to place no restrictions on the protestants in the presentation of their views. Much of what was presented in this connection, was, however, not germane to the issues in this case. If the proposed offering of the applicant is a public utility offering of telephone service the law clearly requires that we assume jurisdiction over it whatever the collateral consequences may be. If, in addition, the proposed rates are fair and reasonable, we have no alternative but to accept the tariff offered for filing.

While some of the private operators or their representatives who presented testimony held views somewhat similar to those expressed by the Congressman, several indicated that they could meet and live on the rates being proposed by Pacific. One private operator indicated that the cost of mobile equipment for transmission at frequencies above 400 megacycles is greater than that for lower frequencies and that the proposed rates of Pacific are too low for this higher frequency band.

Others indicated a competitive advantage to the utility because it could offer 24-hour per day maintenance service in its many service shops throughout the State. Certain of these parties contended that Pacific's participation in this business constitutes "unfair competition" and that it will ultimately obtain a monopoly of the business.

Our comments on the fears of the protestants can therefore, be brief. Sincere though they be, they have not been proved in this record to be well founded.

There is a fear that the telephone company will use this service as an entering wedge to secure ultimate control over all wave lengths now devoted to private communications. But this can be done only by order of the F.C.C., which is charged, as truly as is this Commission, with the duty of protecting the public interest. There is a fear that the applicant will get control of all the California mountaintops suitable for the location of base stations. Here again, if the danger should ever become acute there is public authority to deal with unfair business practices. There is a fear that this Commission is being used to subvert the intent of the Consent Decree. But the federal court has continuing jurisdiction and does not need the offices of this Commission either to interpret or to enforce its orders. There is fear that the competition of the telephone company will drive the smaller suppliers of this type of service out of business. Protestants' testimony on this score, however, shows some internal inconsistencies. On the grounds of preserving competition, they seek to bar a competitor from the field. In fearing the competition of Pacific. they assume that it will have insuperable competitive advantages; while, in discussing Pacific's motive in making this public offering, they emphasize the disadvantages which regulation involves.

We are not convinced that Pacific's presence in the field will constitute any threat to the continued vigor of its competitors. It should not, does not propose to, and will not be allowed to favor its own private mobile customers by way of connections with its "land lines" no

allowed to the customers of its competitors. It will be required to maintain charges which are fully compensatory. It will be under the disadvantage of being unable to enter into price competition with its competitors to secure the business of particularly desirable customers; and it will be required to serve customers its competitors may not elect to serve. There is no danger here which would justify our going to the Legislature to ask to be relieved of the duty which the law now imposes upon us to regulate the service.

The Commission finds that competition of regulated companies with the nonregulated, if it is unfair at all, is more likely to be unfair to the regulated rather than to the nonregulated competitors. The record made it clear, and a supplemental filing has given additional assurance, that the applicant will not grant special favors in connection with its regular telephone service to its own mobile telephone customers. In any event, in the Commission's opinion, the public has less to fear from the activities of a "monopoly" when such "monopoly" is fully regulated by public authorities and we fail to find that Pacific will be in a position to compete unfairly with its smaller rivals.

While it was frequently asserted at the hearing that Pacific's motive was to avoid the Consent Decree, there was no proof and the Commission certainly will not take judicial notice of good or bad intentions. In any event, it is for the federal courts, and not for this Commission, to implement their decisions; and the Consent Decree seems specifically to assume that such activities as the one here in contemplation can be rendered by applicant without any injurious effect on the public welfare, so long as such

activities are regulated by state commissions. We believe that, if this is the implication of the Consent Decree, it is a fully justified position. If the federal court had wished to bar such activities by the applicant even though subjected to regulation, it would have made such provision and the question would not be before this Commission. So far as the effect of the Consent Decree is concerned, it is not actually pertinent to the issues in this case. If the proposed service would be utility service in the absence of that decree, it is still utility service. If we held this service to be utility in nature in the gas company cases before the Consent Decree, there is nothing in the Consent Decree to prompt us to change our holding. If our previous holding that this service is utility in nature, distasteful to Pacific at the time it was made, now turns out because of the Consent Decree to be beneficial to the applicant, that in no wise affects the validity of our previous holding.

It is to be noted that, with the exception of the City of Los Angeles, all protestants were or represented other operators in the private mobile radio telephone field. Their own convenience would be served by the elimination of a competitor.

The members of the using public who appeared or contacted the Commission by correspondence, including both present and prospective patrons of applicant's private mobile service, were unanimously and vigorously of the opinion that applicant's service in this field is excellent, reasonably priced, and needed. No one else has offered the service to all comers on equal terms and some of the witnesses testified they could not get satisfactory service

except from applicant. From the mere fact that no other supplier offers the service as a public utility, obliged to serve all qualified applicants without discrimination, the danger is inevitable that, in the absence of applicant's service, some who need this type of service could not get it. Certainly they would have no one from whom they could demand it as a matter of right, as they can from applicant if this tariff is accepted for filing. Being convinced by the record of the importance of this service to those who need it, we cannot escape the conclusion that public convenience and necessity require us to authorize the applicant to supply it.

Issue 5—Jurisdiction over Private Operators

Some protestants contend that if the Commission regulates private mobile communication service furnished to the public by Pacific, it must necessarily regulate all companies or individuals which lease and maintain private mobile communication systems. Pacific states that in the first place, it is fundamental that a regulatory Commission cannot reach out to regulate, as a public utility, an enterprise which has not dedicated its property to the public service as the Constitutions of this State and of the United States guarantee freedom from regulation as a public utility in the absence of such dedication. In this regard Pacific cites several cases [9]

[9] *Frost Trucking Co. v. RR Com.* (1926) 271 U.S. 583; *Souza v. Public Utilities Com.* (1951) 37 Cal. 2d 539, 542-543; *Samuelson v. Public Utilities Com.* (1951) 36 Cal. 2d 722, 732-833; *Cudahy Packing Co. v. Johnson* (1939) 12 Cal. 716, 721-722; *Story v. Richardson* (1921) 186 Cal. 162, 167; *Richardson v. Railroad Commission* (1923) 191 Cal. 716, 721-722; *Associated Etc. Co. v. Railroad Commission* (1917) 176 Cal. 518.

Those persons and companies, other than Pacific, providing private mobile communication systems on a lease maintenance basis, which offered evidence on the subject of dedication denied any intention of dedicating their systems to the public. Each of them reserved the right to refuse to deal with certain members of the public. Most of the private individuals or companies in this business serve within a small or restricted area whereas Pacific's proposed area covers practically the entire state. The record shows that Pacific is competing with many of these other parties in these small or restricted areas.

The question as to whether or not the Commission should assume jurisdiction over other private mobile operators is not in issue in these proceedings. The basic difference between the service offered by the telephone company and that offered by its competitors is that the telephone company now offers to render service on the same basis to all qualified applicants for such service. If and when any of the other companies hold out their service to the general public (or to such portion of the public as can qualify for it) they will undoubtedly assume public utility status as telephone companies, and will subject themselves to regulation. Until that happens, we shall have no authority to regulate them. It is only public telephone companies offering to serve the public and not private operations of a telephone nature that are within our jurisdiction. Our conclusion on this issue is that, until there is evidence that these private persons or companies, other than Pacific, have dedicated or are willing to dedicate their service to the public, we have no authority to and should not attempt to regulate them.

Issue 6—Effect on Pacific's Regular Communication Service

A witness for the Commission staff prepared Exhibit No. 18 for the purpose of entering into the record the current situation regarding held orders (as of September 30, 1956) in Pacific's service territory. The held orders and held regrade requests for the years 1953 through 1955 and the first three quarters of 1956 follow:

End of Quarter	Held Orders	Held Regrade Requests
1953—First	97,372	88,649
—Second	90,534	83,176
—Third	81,310	86,670
—Fourth	54,345	75,450
1954—First	47,413	63,953
—Second	40,367	38,470
—Third	34,824	37,777
—Fourth	20,279	32,083
1955—First	27,292	31,900
—Second	27,958	32,085
—Third	28,441	37,353
—Fourth	29,061	47,596
1956—First	33,289	53,155
—Second	30,550	64,223
—Third	23,878	73,331

The significance attached to these figures by the witness was that as of September 30, 1956, there were 97,209 applicants for service that Pacific either has not been able to provide with service or has not been able to provide with the grade of service they desire. This is a larger number than has occurred at any time since the first quarter of 1954. The bearing of these facts upon the proposed Tariff 108-T is that mobile radio service, in his opinion, competes with Pacific's primary obligation, that is, the rendering of normal telephone service, for money

for new construction, management time and engineering time.

The staff recommended that the Commission permanently suspend Tariff Schedule 108-T because Pacific is not and has not been providing telephone service on a current basis. The staff further recommended that Pacific devote its full efforts towards fulfilling its basic utility obligations; and that Pacific not be permitted to serve new private mobile customers until such time as its held order and regrade situation is on a current basis as defined in Decision No. 53312 of this Commission.

Pacific's witness held a different view and testified that if all of the management and engineering time and money and material devoted to private mobile telephone service were devoted to clearing held orders, no held order could or would be cleared any sooner than it can and will be cleared under Pacific's present plans. He stated the real problem is the unpredictable nature of telephone demand and unforeseen shifts in population growth and movement, which in some instances require a planning and construction interval of eighteen months to two years before telephone plant can be ready for use.

The California Farm Bureau Federation supported Pacific's position in this matter and stated that of the 33,000 unfilled primary service orders as of April 30, 1956, two-thirds were less than three months old, and that in 300 out of the 491 centers the held order problem for primary service is susbtantially nonexistent. At page 8 of Exhibit No. 18 it is established that the held order problem is concentrated in three areas—San Jose, Sacramento and Orange County. The Farm Bureau concludes that the

diversion of Pacific's capital and personnel from all other classes of service to concentrate on the reduction of the number of held orders would not accelerate to any marked degree the results of the efforts currently devoted to the filling of primary service orders on a current basis.

Our conclusion on this issue is that we cannot say with certainty that Pacific's activities in the private mobile telephone field do not delay, to some extent, the fulfillment of the public's request for new telephone service or upgrading of service. The primary obligation of The Pacific Telephone and Telegraph Company is the provision of basic exchange and toll telephone service in the territory in which Pacific furnishes that service as a monopoly. While we are impressed with the importance of private mobile communication service to the public, a substantial portion of the public may obtain such service from organizations other than Pacific. In the territory served by Pacific, basic telephone service can be obtained from no other source. Considering all the circumstances, we are nevertheless of the opinion that no restrictions other than those herein provided should be placed on the offering of private mobile service at the present time.

Issue 7—Rate Level

Pacific's estimated operating results under the proposed rates are set forth in Exhibit No. 5 and indicate that the rate of return is 6.8 percent. The Commission staff studied this matter and introduced Exhibit No. 21 which indicates that the proposed revenues do not cover all of the expenses and the resulting rate of return is a red figure of 3.0 percent. These two analyses in summary form are:

	Pacific's Exh. No. 5	Staff's Exh. No. 21
Revenues (Estimated Annual Basis)	$ 638,125	$ 638,125
Expenses and Taxes		
Maintenance	165,668	355,077
Depreciation	175,907	175,907
Traffic	---	---
Commercial and General Expense	105,752	105,752
State and Federal Income Taxes	70,043	---
Other Taxes	38,063	38,063
Total Expenses and Taxes	$ 555,433	$ 674,799
Net Revenue	$ 82,692	$ (36,674)
Telephone Plant in Service	$1,668,129	$1,668,129
Depreciation Reserve	453,214	453,214
Net Telephone Plant	$1,214,915	$1,214,915
Rate of Return	6.8%	(3.0)%

(Red Figure)

The main difference between the two estimates is in the items of maintenance expense and the related income tax. The staff had investigated the maintenance arrangements of Pacific and came to the conclusion that the unit maintenance costs for mobile and base stations used by Pacific in developing Exhibit No. 5 are substantially lower than those actually experienced by Pacific. Exhibit No. 21 represents the efforts of the staff to appraise the operations cost showing of Pacific and to make adjustments to the extent that Pacific's figures permitted the staff to do so. The staff's analysis indicates a loss from private mobile operations.

The staff also recommended permanent suspension of Schedule 108-T because the rates proposed therein are not compensatory and therefore the private mobile telephone

service will be a burden to the general ratepayer. The staff further recommended that at such time as Pacific is on a current basis with respect to held orders, and if the Commission finds this a proper field of activity for Pacific, it could then file proposed rates based on costs supported by the separate records. In making its study, the staff had determined that Pacific does not maintain separate records on all of its private mobile costs but keeps them jointly with the public mobile communication costs.

The maintenance expenses developed from actual experience by the Pacific Company in its Exhibit 9, for the year 1955, reflect approximately the same level of unit maintenance expenses as those used by the staff in its estimates. However, one of Pacific's witnesses testified that it was his opinion that the maintenance costs used by the Commission staff were invalid because they were based on certain accounting information without an analysis of the infirmities of that information for this purpose. He testified that the accounting information used by the staff did not represent the going level of expense since it reflected abnormally high training costs during a period of extremely rapid growth and also included susbtantial costs of converting the existing systems from 6 to 12 volt batteries. Pacific's position is that the staff's results of operations study was based on a past period and is not indicative of the lower costs that will be experienced in the future for this service. Pacific states that the proposed rates are not only compensatory but they are about the same as the rates of its competitors.

Pacific agreed to revise Section D of Schedule 108-T in accordance with a recommendation of the staff. This sec-

tion, which specifies rates on a cost basis for special equipment not named in the tariff, will, in its revised form, provide for review by the Commission prior to such rates becoming effective, to insure against any preferential or discriminatory treatment of customers. Pacific also revised the proposed tariff by adding a condition (Exhibit No. 1-B) which, carrying out its existing practice, expressly precludes discrimination in the matter of interconnection of private mobile equipment with the general exchange and toll switching system of Pacific, as between Pacific's private mobile customers and those of its competitors.

The issues in this matter were fought primarily on jurisdictional grounds and the interested parties had virtually nothing to offer as to the adequacy of the proposed rates. The Commission's opinion is that Pacific's showing was more convincing than that of the staff. Also, there is evidence that the competing companies charge about the same rates as those proposed except, perhaps, for the higher frequency stations; and that they find those rates adequate. Moreover, in the absence of a convincing showing, the Commission is reluctant to require a utility to charge a higher rate than in its judgment is necessary.* Except for the very highest frequency, which is still more or less in the experimental stage,* we can adequately protect the public by placing Pacific on notice that it will be required to keep adequate and accurate records of the separate costs of the service by frequency bands so that we

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*[There is apparently a typographical error here. The sense of the text indicates that the sentence should end after the word "stage" rather than after the word "necessary".]

may, in any future rate proceedings, be sure that the regular telephone subscribers are not being required to make up any deficits.

Findings and Conclusions

Based upon a consideration of the evidence, the Commission finds and concludes:

1. That Pacific is a telephone corporation and a public utility.

2. That the private mobile communication systems and service now furnished under contract by Pacific and proposed in Tariff Schedule No. 108-T constitute a telephone line and public utility telephone service, under the provisions of the Constitution and the Public Utilities Code; and that Pacific has dedicated the same to the public.

3. That the private mobile communication equipment is necessary or useful in Pacific's performance of its duties to the public and the leasing of such equipment is subject to Commission jurisdiction as provided in Section 851 of the Public Utilities Code.

4. That the Commission under Sections 455, 728 and 729 of the Public Utilities Code has the power to establish rates for private mobile communication systems in lieu of contracts.

5. That the Commission under Section 455 of the Public Utilities Code has the power to accept, alter or permanently suspend the proposed rates or to establish other rates which it finds to be just and reasonable.

6. That the proposed rates, except for a revision of Section D relating to Special Equipment and Arrangements of Schedule No. 108-T, and the inclusion of Condition II, Exhibit No. 1-B, as hereinbefore mentioned, and except for the frequency range of 400-470 megacycles, are just and reasonable; that Pacific should be required to revise said Section D as provided in the order hereof, to add to Schedule No. 108-T the Condition in Exhibit No. 1-B, and to apply a 10 percent surcharge on the rate per month for land stations and for mobile stations where the frequency of operation is within the frequency range of 400-470 megacycles pending further study and accumulation of separate costs by frequency bands on this service; and upon Schedule No. 108-T being so revised and supplemented that the suspension should be lifted.

INTERIM ORDER

The Commission having on April 24, 1956, instituted investigation of Schedule No. 108-T of The Pacific Telephone and Telegraph Company and having suspended said schedule until August 28, 1956, and on August 21, 1956, having extended the suspension for a period six months beyond August 28, 1956, public hearing having been held and the Commission being of the opinion that the rates should be authorized on an interim basis pending further analysis of the costs; therefore,

IT IS HEREBY ORDERED that:

1. The suspension of operation of said Schedule No. 108-T filed by Advice Letter No. 6371 is lifted subject to the following conditions:

a. Pacific shall revise Schedule D on Original Sheet 9 to read: "For special equipment and arrangements not specifically covered in this schedule, charges equivalent to the estimated cost of furnishing such equipment and arrangements apply, subject to prior review of such charges by the Public Utilities Commission of the State of California. (Includes use of housing, power, and antenna support to the Telephone Company's radio sites, and provision of amplitude modulated (AM) equipment.)"

b. Condition 11, set forth in Exhibit 1-B, shall be added to Original Sheet 17 of Schedule No. 108-T.

c. Pacific shall file a supplemental rate tariff sheet or revise the filing in such manner as to provide a 10 percent surcharge on the monthly rate applicable to land stations and to mobile stations where the operating frequencies are in the range 400-470 megacycles.

2. Pacific shall augment its accounting records in such manner as to keep separate memoranda that will permit it to develop the complete capital, revenue expenses, net revenue and rate of return on a depreciated rate base for its private mobile communication systems by frequency bands in the future.

3. Pacific shall make and file reports with the Commission at six-month intervals, the first report being based on the six-month interval ending August 31, 1957, and filed within forty-five days thereafter, showing revenues received from and summarizing the cost of providing private mobile communication systems by frequency bands, and continue making such reports until final order by the Commission in this proceeding.

4. The Commission retains its jurisdiction in this matter pending filing of the reports and the determination by the Commission of the proper final rate levels for the private mobile communication service.

5. Pacific shall give persons now receiving private mobile communication service under filed contracts the option of continuing to receive such service under the provisions of such contracts for a term not exceeding five years or of terminating such contracts at any time and thereafter receiving service under the filed tariff.

6. The effective date of this order shall be twenty days after the date hereof.

Dated at Los Angeles, California, this 29th day of January, 1957.

Peter E. Mitchell,
President,
Ray E. Untereiner,
Matthew J. Dooley,
Rex Hardy,
C. Lyn Fox,
Commissioners.

(Appendix A omitted.)